UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 16

Docket No. DA-0752-13-0134-I-1

Cecil Cole,

Appellant,

v.

Department of the Air Force,

Agency.

March 11, 2014

Craig T. Barron, Oklahoma City, Oklahoma, for the appellant.

Preston L. Mitchell, Esquire, Tinker Air Force Base, Oklahoma, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision that reversed its action removing the appellant for use of an illegal drug. For the reasons set forth below, we GRANT the agency's petition, VACATE the initial decision, and SUSTAIN the agency's action removing the appellant.

BACKGROUND

¶2 The appellant served as an Aircraft Engine Repairer at the agency's Tinker Air Force Base in Oklahoma. Initial Appeal File (IAF), Tab 5 at 15. By notice dated August 10, 2011, the agency informed the appellant that it had designated

his position as a drug-testing designated position (TDP) and that he would be subject to urinalysis testing on an unannounced random basis. *Id.* at 45-46. By notice dated September 6, 2012, the agency ordered the appellant to submit to random drug testing. *Id.* at 38-39. The appellant reported for drug testing; he submitted a urine sample; and he signed a form certifying, inter alia, that the sample was not adulterated, that each specimen bottle used was sealed with a tamper-evident seal in his presence, and that the information on the form and on the label affixed to each specimen was correct. *Id.* at 36.

¶3 On September 24, 2012, the Medical Review Officer (MRO) contacted the appellant by telephone, informed him that his sample had tested positive for marijuana metabolites, and asked him if there was any legitimate medical explanation for the results. Hearing Transcript (HT) at 9-14 (testimony of the MRO); *see also* IAF, Tab 5 at 35 (lab report signed by the MRO). The appellant responded by admitting to the MRO that he had used marijuana. HT at 10 (MRO).[1] The MRO then informed the appellant that the appellant had a positive test result for marijuana, that the result would be reported to his employer as such, and that the appellant had the opportunity to have the "B" portion of his split sample tested at an independent laboratory. HT at 10-13.[2]

¶4 The agency thereafter proposed the appellant's removal based on a charge of "[u]se of an illegal drug." IAF, Tab 5 at 29-31. In support of the charge, the proposal notice specified, inter alia, that:

> On 06 September 2012, at 0650 hours, you were ordered to report for random drug testing at the Demand Reduction Office. On 24 September 2012, [the MRO] notified the agency that you tested positive for an illegal drug; specifically, marijuana. The MRO also indicated that there was no legitimate medical explanation for your

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[1] The appellant did not testify at the hearing.

[2] There is no evidence that the appellant indicated that he wanted the split sample tested.

> positive test. Your positive test is in direct violation of your TDP and responsibilities as an Air Force employee.

Id. at 29.

¶5 The appellant, through his representative, submitted a written response to the proposal notice. *Id.* at 26. In it, the appellant stated, in part, that he "freely admits that he has used marijuana," but that he sought and was undergoing treatment "for his illegal drug use." *Id.* The appellant also stated that he had "admitted guilt and shown remorse"; he apologized for any embarrassment that his actions may have caused; and he stated that he "is no longer using illicit drugs." *Id.* The appellant and his representative also made an oral response to the proposed removal. The deciding official prepared a Memorandum for Record, which states in relevant part:

> Mr. Cole did apologize for his actions and provided documentation showing that he had completed rehab program.
>
> Mr. Cole has taken steps to deal with his addiction, for this I applaud him, but it doesn't change the fact that he failed a drug test.

Id. at 24; *see also* HT at 38 (testimony of the deciding official that the appellant "admitted to the usage" during his oral response to the charge). The agency thereafter issued a decision letter finding that the charges were supported by the evidence and warranted the appellant's removal. IAF, Tab 15 at 4-5.

¶6 This appeal followed. IAF, Tab 1. After a hearing, the administrative judge reversed the agency's removal action. IAF, Tab 31, Initial Decision (ID) at 1, 8. The administrative judge determined that, in order to establish its charge, the agency was required to show that the appellant tested positive for marijuana based on the drug test administered on September 6, 2012. ID at 4-6. Although the administrative judge considered the appellant's admission that he used marijuana, she found that the admission, standing alone, failed to establish by preponderant evidence that he tested positive for marijuana on the drug test. ID at 8. In so finding, the administrative judge also noted that the record failed to show when the appellant used marijuana, and furthermore, that it did not reflect

that the appellant specifically admitted to failing the drug test. *Id.* The administrative judge also determined that the agency failed to establish that the test on which it relied to remove the appellant was valid because it had not established a complete chain of custody.[3] *Id.* She thus concluded that the agency's charge, which she found was based on the appellant's positive drug test, could not be sustained. *Id.*

¶7 The agency has filed a petition for review, and the appellant has filed a response in opposition to the agency's petition. Petition for Review File, Tabs 1, 3.

ANALYSIS

The agency proved its charge of use of an illegal drug by preponderant evidence.

¶8 As stated above, the agency charged the appellant with "use of an illegal drug." IAF, Tab 5 at 29. Where, as here, the agency chooses to label an action of alleged misconduct, it must prove the elements that make up the legal definition of the charge, if any. *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202 (1997). An agency is required to prove only the essence of its charge, however, and need not prove each factual specification supporting the charge. *Hicks v. Department of the Treasury*, 62 M.S.P.R. 71, 74 (1994), *aff'd*, 48 F.3d 1235 (Fed. Cir. 1995) (Table). Here, the essence of the agency's charge, as indicated by its label, is that the appellant used an illegal drug. Thus, the proposal notice referred to the

[3] In this regard, the administrative judge noted that the agency's documentary evidence concerning chain of custody ended with the individual who received the appellant's specimen at the testing site, and that it was not clear how the specimen was transported from the agency to the lab because the box on the form labeled "SPECIMEN BOTTLE(S) RELEASED TO" is left blank. ID at 4; *see* IAF, Tab 15 at 3. The administrative judge also noted that the evidence did not show who received the specimen at the lab or if the seal on the bottle was intact at the time of receipt. ID at 4. The administrative judge also noted that the record failed to reflect where the specimen was between September 12, 2012, when the specimen arrived at the lab, and September 17, 2012, when the lab reported on the specimen. *Id.*

agency's Civilian Drug Demand Reduction Program, and stressed the agency's requirement that employees in TDPs refrain from the use of illicit drugs, as the agency had determined that the use of illicit drugs poses a risk to its mission and public safety. IAF, Tab 5 at 29.

¶9 There is no dispute that the appellant admitted that he had used marijuana in response to the MRO's question whether there was any legitimate medical explanation for the drug test result. HT at 10. Further, as noted above, the appellant "freely admit[ted]" in his written response to the proposal notice that he had used marijuana, and, further, he stated that he had "admitted guilt and shown remorse" for engaging in the charged misconduct. IAF, Tab 5 at 26. An agency may rely on an appellant's admissions in support of its charge, *Leaton v. Department of the Interior*, 65 M.S.P.R. 331, 337 (1994), *aff'd*, 64 F.3d 678 (Fed. Cir. 1995) (Table), and an appellant's admission to a charge can suffice as proof of the charge without additional proof from the agency, *see Wells v. Department of Defense*, 53 M.S.P.R. 637, 643-44 (1992) (the appellant's admission that he engaged in alleged conduct in violation of a regulation is sufficient proof to sustain the charge of disregarding a regulation or directive); *Mascol v. Department of the Navy*, 7 M.S.P.R. 565, 567 (1981) (the appellant's admission was sufficient to sustain the charge). Indeed, we note that the agency's Civilian Drug Demand Reduction Program, which is referenced in the proposal notice, provides, in relevant part:

> **1.26 Finding of Drug Use**
>
> 1.26.1. An employee may be found to have used illicit drugs on the basis of any appropriate evidence including, but not limited to:
>
> * * *
>
> 1.26.1.3. A[n] MRO verified positive test result for the presence of an illicit drug.
>
> 1.26.1.4. An employee's voluntary admission of usage of an illicit drug.

IAF, Tab 6 at 4, 44. Further, the appellant did not attempt to recant his admissions; he did not claim that they were coerced or otherwise involuntary; and he failed to rebut the agency's testimonial evidence concerning those admissions at the hearing. Under the circumstances, we infer that he does not dispute that evidence. *See Leaton,* 65 M.S.P.R. at 337 (the Board inferred from the appellant's failure to testify that he did not dispute that he admitted to engaging in charged misconduct). We therefore find that the appellant's numerous unrecanted admissions that he used marijuana constitute preponderant evidence that he used an illegal drug, as charged.

¶10 We disagree with the administrative judge that, even though the appellant admitted that he used an illegal drug, the agency was also required to show that the appellant tested positive for marijuana based on the drug test administered on September 6, 2012, in order to establish its charge. ID at 4-5. The administrative judge appears to have required proof that the appellant failed the drug test because that allegation was the sole specification supporting the charge of use of an illegal drug. *See* ID at 7. We note, however, that the appellant's statements that he "freely admits that he has used marijuana," and that he had "admitted guilt" could not have been included as specifications because they were made in the context of the appellant's response to the charge. We reject the administrative judge's approach because it would preclude the Board from considering the probative value of such admissions in determining whether the agency's charge is supported by preponderant evidence.

¶11 Because we find in this case that the appellant's admissions constitute preponderant evidence that he used an illegal drug, as charged, the administrative judge's determination that the agency failed to establish the validity of the test through a complete chain of custody is also not dispositive. *See Frank v. Department of Transportation,* 35 F.3d 1554, 1556-58 (Fed. Cir. 1994) (declining to apply a per se rule requiring actions based on drug testing to be set aside because of chain of custody problems with test samples); *cf. Moen v. Department*

of Transportation, 28 M.S.P.R. 556, 558-60 (1985) (declining to overturn presiding official's determination that the chain of custody for the appellant's drug test samples was broken, but finding that the agency nonetheless established its charge of marijuana use through the sworn statements of a coworker who claimed to have observed the appellant using marijuana).

¶12 Although the administrative judge cited the Board's decision in *Boykin v. U.S. Postal Service*, 51 M.S.P.R. 56 (1991), as support for her determination that the agency must prove that the test on which it relied to remove the appellant was valid, we find that *Boykin* is distinguishable. First, in *Boykin*, the charge at issue was "testing positive for cocaine use," not "use of an illegal drug." *Id.* at 58-59. Second, unlike the appellant in the instant appeal, the appellant in *Boykin* did not admit to drug use, either in his response to the MRO or in his response to the notice of proposed removal. The only evidence that the agency submitted in support of its charge of testing positive for cocaine use was the positive test result. *Id.* Thus, the Board in *Boykin* was not concerned with whether the appellant's voluntary admissions constituted preponderant evidence of the charge that he used an illegal drug.

¶13 Because we conclude that the appellant's voluntary admissions constituted preponderant evidence of the charge that he used an illegal drug, the agency's charge is SUSTAINED.

The penalty of removal is reasonable.

¶14 Where, as here, the agency's charge is sustained, the Board will modify an agency-imposed penalty only when it finds that the agency failed to weigh the relevant factors under *Douglas v. Veteran's Administration*, 5 M.S.P.R. 280, 305-06 (1981), or the penalty imposed clearly exceeded the bounds of reasonableness. *Jacoby v. U.S. Postal Service*, 85 M.S.P.R. 554, ¶ 15 (2000). In evaluating the penalty, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relationship to the employee's duties, position, and responsibilities, including whether the offense was intentional or

was frequently repeated. *Singletary v. Department of the Air Force*, 94 M.S.P.R. 553, ¶ 12 (2003), *aff'd*, 104 F. App'x. 155 (Fed. Cir. 2004).

¶15 The Board consistently has held that removal is a reasonable penalty for drug use when the employee performs work that, if the employee were impaired, could result in substantial danger to life and property, notwithstanding other mitigating factors. *Patterson v. Department of the Air Force*, 77 M.S.P.R. 557, 563-64, *aff'd*, 168 F.3d 1322 (Fed. Cir. 1998) (Table). Thus, in *Thomas v. Department of the Air Force*, 67 M.S.P.R. 79, 83, *aff'd*, 66 F.3d 346 (Fed. Cir. 1995) (Table), the Board found that removal for a first offense was appropriate for a journeyman aircraft mechanic, considering that a mistake could result in the loss of both an aircraft and its crew.

¶16 As in *Thomas*, we find that the nature of the appellant's work in this appeal renders the sustained misconduct serious, as work performed on an aircraft engine while under the influence of drugs could result in an accident with the potential loss of life and property. *See id.* at 82-83; *see also Davis v. Department of the Navy*, 44 M.S.P.R. 572, 575-76 (1990) (sustaining removal of naval shipyard machinist, whose work involved the overhaul of nuclear submarines, for possession and sale of marijuana). The serious risk to the safety of those dependent upon the proper maintenance of an aircraft obviates the mitigating factors. *See Thomas*, 67 M.S.P.R. at 83; *Schulmeister v. Department of the Navy*, 46 M.S.P.R. 13, 15-16 (1990) (sustaining the removal for possession of cocaine and methamphetamine of an employee whose duties involved inspecting, modifying, and repairing the specialized tooling used in nuclear refueling of nuclear warships), *aff'd*, 928 F.2d 411 (Fed. Cir. 1991) (Table).

¶17 We further note that Executive Order No. 12,564 requires initiation of disciplinary action, including removal if appropriate, where an employee has been identified as a user of illegal drugs, provided that he has not voluntarily identified himself or volunteered for testing, prior to being identified by other means. 51 Fed. Reg. 32,889, § 5(b)(1) and § 5(g) (Sept. 15, 1986). The Order does not

limit an agency's authority to remove an employee based on a first offense. The agency's Civilian Drug Demand Reduction Program, as well as its notice to the appellant of August 10, 2011, regarding its testing policy for his position, are consistent with Executive Order No. 12,564.

¶18 Because the agency considered the relevant mitigating factors, and because the appellant was on notice that removal was a possible consequence of illegal drug usage, even for the first use, we find that the agency's selection of the removal penalty was a proper exercise of managerial judgment and did not exceed the limits of reasonableness.

¶19 The agency's removal action is SUSTAINED.[4]

ORDER

¶20 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).[5]

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

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[4] Because we decide this case on other grounds, we decline to address the agency's argument that the administrative judge improperly refused to permit the agency to submit evidence regarding the chain of custody. PFR File, Tab 1 at 4, 7.

[5] The appellant has requested that the Board dismiss the agency's petition for review for failure to provide interim relief. PFR File, Tab 3. We deny the request because the administrative judge did not order the agency to provide interim relief. *See* 5 C.F.R. § 1201.116(a) (requiring that a petition for review be accompanied by certification of compliance when interim relief was ordered).

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.